Neutral Citation Number: [2022] EAT 194

EA-2019-000708-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 January 2023

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

KITE et al **Appellant**

- and –

MS MADELINE CLARK **Respondent**

- -
- -

MOHINDERPAL SETHI KC (instructed by Howat Avraam Limited) for the **Appellant**
MADELEINE CLARK the **Respondent** in person

Hearing date: 30 November2022

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The employment tribunal did not err in law in refusing the respondents' application for costs without holding a hearing or seeking further written submissions

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of Employment Judge Norris, sent to the parties on 10 June 2019, refusing the respondents' application for costs. The appeal was received by the EAT on 18 July 2019. The claimant raises an issue as to the identity of those who have brought the appeal and contends that on a proper analysis the appeal is invalidly instituted. Subject to that procedural issue, it is asserted by the respondents that the application for costs was dismissed without them having had a fair opportunity to advance their submissions in support of the application.

2. It is necessary to understand a little of the complex procedural history of this claim. The claimant is a barrister who specialises in tax law. In 2017 the claimant was approached and asked to consider applying to work for an unlimited partnership, Harney Westwood and Riegels ("HWR"). She took up the offer. The claimant was dismissed with effect from a date that was in dispute between the parties, the claimant contending that her employment terminated at the end of her contractual notice period, whereas the respondents asserted there had been an immediate dismissal with a payment in lieu of notice.

3. The claimant submitted a first claim form that was received by the employment tribunal on 11 September 2018, and a second on 18 January 2019. The claimant named the respondents as Phillip R Kite, William Peak, A Ross Munro, Russell M Willings ("the named respondents") and HWR. The claimant asserted that the named respondents were partners of HWR who lived and worked in the UK and were resident for tax purposes. The claimant asserted that the partners had joint and several liability to her. There are other partners of HWR who are not resident in the UK.

4. The respondents contended that the claimant was employed by Harneys Gill ("HG") a Cayman Islands partnership. The respondents asserted that the correct name of the fifth respondent was Harney Westwood & Riegels LLP ("HWR LLP") and that the named respondents were appointed as designated members of HWR LLP, save for Mr Peak who was employed by HWR LLP as a local partner. They asserted that the claimant had never been employed by any of the respondents. It was

also stated that none of the named respondents had ever been partners or employees of HG.

5. The matter was considered at a preliminary hearing for case management by Employment Judge Segal KC who directed that a preliminary hearing should be held to consider the correct identity of the respondents, the date of termination of the claimant's employment, whether there had been a failure to comply with the requirements of ACAS early conciliation, amendment, strike out or making a deposit order, and case management. It was agreed that the fifth respondent was the unlimited partnership (i.e. HWR rather than HWR LLP).

6. A preliminary hearing was heard by EJ Norris on 14-15 February, 18 March and in Chambers on 8 April 2019. By a judgment sent to the parties 25 April 2019 the employment judge held that "The Tribunal does not have jurisdiction to hear the Claimant's claim, which is accordingly struck out". The key findings of EJ Norris were that the claimant had been employed by HG, the employment tribunal did not have territorial jurisdiction to consider the claim, there had been a failure to comply with ACAS early conciliation and the claim was submitted out of time. The claimant appealed.

7. The respondent applied for costs in the employment tribunal on 22 May 2019. The application stated "Details of the application and the reasons why it is sought are contained in the application itself". The only "grounds" of the application for costs were:

> 2.1. The application for costs is based on the following grounds:
>
> (1) Misconceived claim: "any claim … had no reasonable prospect of success" – r76(1)(b); and/or
>
> (2) Unreasonable in either bringing or conducting proceedings: "a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted" – r76(1)(a).

8. The application did not set out which arguments had no reasonable prospect of success, or on what basis that was asserted to be the case; and did not state what conduct on the part of the claimant had been vexatious, abusive, disruptive or otherwise unreasonable.

9. The respondent suggested case management orders:

> 4.1. Rs suggest that the following case management directions are sensible

> and appropriate:
>
> (1) In 28 days parties to disclose by list and copies all documents relevant to Rs' application.
>
> (2) 14 day thereafter, the Claimant to file any evidence upon which she relies relevant, to the issue of the Claimant's means.
>
> (3) 14 days thereafter, parties to agree an indexed and paginated costs hearing bundle.
>
> (4) 7 days before the hearing, parties exchange skeleton arguments.
>
> (5) The hearing of Rs' costs application be listed with a time estimate of 1 day.

10. The claimant responded by applying for the application for costs to be struck out. The claimant suggested that her application should be determined at a hearing.

11. By a judgment with reasons sent to the parties on 12 June 2019, the employment tribunal refused the application for costs without holding a hearing. The employment tribunal held:

> 2. The Respondents have indicated that they are seeking costs under Rules 76(1)(a) and/or (b). They have not stated their reasons for arguing that the claim had no reasonable prospect of success. Their attention is drawn in particular to paragraphs 39 and 46 of the PH Judgment. The identity of the Respondent could only be ascertained following careful consideration of all the available evidence, which had to be heard over more than one day including hearing from witnesses in the Cayman Islands. This was a matter that was central to the progression or otherwise of the case, leaving aside a number of other preliminary issues on which the Claimant also ultimately failed.
>
> 3. In addition, the Respondents are contending that the Claimant has acted vexatiously etc in the bringing of the proceedings or the way in which the proceedings have been conducted. Again, they have not set out any arguments in support of that contention. Costs do not normally follow the event in the Employment Tribunal and the Claimant was a litigant in person, albeit one who is legally qualified (though not in employment law). On the face of it, it would not have been possible to have dealt with the preliminary issues other than through an open preliminary hearing, and indeed EJ Segal at the PHCM on 16 January noted that on what he had seen, the Respondent's assertions at least in relation to the Claimant's employer appeared "speculative". I repeat what I have said in the previous paragraph in that connection.
>
> 4. There being, therefore, no grounds on the face of the matter before me and/or contained in the costs application itself to find either that the claim stood no reasonable prospect under Rule 76(1)(b) or that the Claimant has acted in a way contrary to Rule 76(1)(a), the Respondent's

costs application is dismissed.

12. On 25 June 2019, the respondents applied for reconsideration of the costs judgment.

13. On 2 July 2019, EJ Norris stayed the reconsideration of the costs judgment pending determination of the appeal against her substantive decision on jurisdiction.

14. On 18 July 2019, the respondents appealed the costs judgment. That appeal was stayed pending determination of the substantive appeal.

15. By an order sealed on 21 December 2020, Choudhury J decided that the correct respondent was HWR and that there was territorial jurisdiction against the partners resident in the United Kingdom, although the employment tribunal had not erred in holding that the claim was submitted out of time and there had been a failure to comply with ACAS early conciliation. Accordingly, the appeal against the substantive judgment was dismissed.

16. The claimant sought to appeal the decision of the EAT to the Court of Appeal. Permission to appeal was refused by both the EAT and Court of Appeal.

17. The respondent sought their costs of the appeal. The application was refused by Choudhury J in a judgment sealed on 29 March 2021, on the basis that the claimant had succeeded on the main ground of appeal, the grounds on which she did not succeed were generally not misconceived and the claimant was not guilty of unreasonable conduct.

18. Once the appeal against the substantive judgment had been dismissed the stay of the costs appeal was lifted.

19. The respondent withdrew the application for reconsideration of the costs judgment which was dismissed by an order sent to the parties on 6 September 2021.

20. This judgment is in respect of the appeal against the cost judgment. The Notice of Appeal named the respondents as Messrs Kite, Peak, Ross Munro and Willings, and HWR LLP. The grounds of appeal assert that:

20.1. the application for costs set out the necessary grounds; it did not need to set out the arguments, in full or at all

20.2. the argument in favour of the application was obvious

20.3. the claim was always doomed to failure on a number of grounds in addition to the identity of the employer

21. The claimant applied to strike out the costs appeal on the basis that the respondents who were named in the Notice of Appeal had no power to bring the appeal. It should have been brought by HWR. By an order sealed on 25 January 2022, HHJ Shanks directed that the fifth respondent be amended to be HWR. The claimant objected to that amendment and by a further order sealed on 10 May 2022 HHJ Shanks revoked the previous order and directed that pending further order the respondents would be referred to as "Kite et al" in the title to the proceedings. I directed that this matter should be argued at the full hearing. At the hearing of this appeal Mr Sethi KC applied for the name of the fifth respondent to be amended to HWR.

22. The claimant contends that the parties as set out in the Notice of Appeal have no power to bring an appeal. Any appeal should have been brought solely in the name of the unlimited partnership, HRR, and could not be brought by the partners resident in the United Kingdom in their own names on behalf of the partnership. I consider there is a simple answer to this point. The claimant chose to bring the claim against the named respondents and HWR. It was agreed at the preliminary hearing for case management before Employment Judge Segal KC that the fifth respondent was HWR. Those were the parties that applied for costs and were the proper appellants. I can see no significant prejudice to the claimant in the name of the fifth respondent being amended to HWR to reflect the correct name of the party that the claimant chose to bring a claim against, and that made the application for costs the refusal of which is the subject of this appeal. In any event, I would have found that the named respondents could bring the appeal on the basis that the claimant chose to join them as parties because they were the UK resident partners of HWR.

Costs

23. The Employment Tribunal Rules 2013 provide in respect of costs:

76. When a costs order or a preparation time order may or shall be made

> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
>
> (b) any claim or response had no reasonable prospect of success; or
>
> (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.
> …
>
> 77. Procedure
>
> A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."

24. It has long been the case that costs are the exception rather than the rule, and that costs do not follow the event in employment tribunals: **Gee v Shell UK Ltd** [2002] EWCA Civ 1479, [2003] IRLR 82.

25. The general approach to appeals against costs decision of the employment tribunal was set out in the Court of Appeal by Mummery LJ in **Yerrakalva v Barnsley Metropolitan Borough Council and another** [2011] EWCA Civ 1255, [2012] I.C.R. 420:

> 7. As costs are in the discretion of the employment tribunal, appeals on costs alone rarely succeed in the Employment Appeal Tribunal or in this court. The employment tribunal's power to order costs is more sparingly exercised and is more circumscribed by the employment tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment tribunal costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the employment tribunal's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The employment tribunal manages, hears and decides the case and is normally the best judge of how to exercise its discretion.
>
> 8. There is therefore a strong, soundly based disinclination in the appellate tribunals and courts to upset any exercise of discretion at first instance. In this court permission is rarely given to appeal against costs orders. I have

> noticed a recent tendency to seek permission more frequently. That trend is probably a consequence of the comparatively large amounts of legal costs now incurred in the employment tribunals.
>
> 9. An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general rule it is recognised that a first instance decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The employment tribunal spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The employment tribunal is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties.

26. The respondents asserted that the question of whether a party applying for costs should be given an opportunity to make oral submissions before the application is determined had not previously been considered by the EAT. That is not correct. The matter was considered in **Onyx Financial Advisors Ltd v Shah** UKEAT/0109/14/KN. In that case the respondent had applied for costs by letter setting out the core grounds and making it plain that there was further information and argument which the respondent wished to present to the employment tribunal. HHJ Richardson held:

> Discussion and Conclusions
>
> 16. Rules 74 to 79 and 83 to 84 of the Employment Tribunal Rules of Procedure 2013 set out provisions concerning the making of costs orders and preparation time orders. Rule 76(1) confers the powers upon which the Respondent relied in its letter dated 11 October. Rule 77 is the only procedural provision relating specifically to costs and preparation time orders. It provides as follows:
>
> > "A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."

17. The overriding objective applicable to Employment Tribunal proceedings is set out in rule 2. It is to enable Employment Tribunals "to deal with cases fairly and justly". The objective includes dealing with cases in ways which are proportionate to the complexity and importance of the issues. It also includes avoiding delay, avoiding unnecessary finality, seeking flexibility in the proceedings and saving expense.

18. It is plain from rule 77 that the Employment Tribunal has a broad discretion as to the manner in which it deals with an application for costs. A hearing is not always necessary. An application may be dealt with on written submissions. Rule 77 deals specifically with the position of the paying party. That party must have a reasonable opportunity to make representations in response to the application.

19. What about the position of the applicant? Although rule 77 does not deal specifically with the position of the applicant, it is to my mind plain that the applicant too must have a fair opportunity to put its case. This is fundamental to civil procedure of all kinds and inherent in the overriding objective. The fact that an applicant must have a fair opportunity to put its case certainly does not mean that the applicant must always be afforded an oral hearing. On the contrary, it is the applicant which is putting forward the case, and it will usually be reasonable to expect the applicant to put that case in writing. But there are proceedings where a case cannot easily be developed in writing. The heavier the litigation and the greater the detail, the more difficult it may be to address the whole matter on paper without a hearing. In such a case, the applicant may ask for an oral hearing, and even if the applicant does not ask for a hearing, the Employment Tribunal may conclude that one is necessary.

20. The Employment Tribunal is of course not bound to grant an oral hearing simply because the applicant asks for one. If it considers that the applicant can have a fair opportunity to put its case in writing, it is entitled to say so. But if it refuses an oral hearing where, as in this case, it is plain that the applicant had not intended to make its case purely in writing, the Employment Tribunal should give directions so that the applicant has a fair opportunity to put its case fully in writing.

21. The Employment Appeal Tribunal has a limited role to play in supervising matters of case management such as whether and how to determine a costs application. The Employment Appeal Tribunal is empowered to intervene only on a question of law. In a matter of case management there will be no error of law unless the Employment Tribunal has adopted the wrong legal approach, left out of account that which it was essential to take into account, taken into account that which was irrelevant or reached a decision outside the generous ambit within which reasonable disagreement is possible.

22. I have reached the conclusion that the manner in which the Employment Tribunal dealt with the Respondent's letter dated 11 October 2013 is unsustainable. The letter made an application for a hearing to determine costs at the conclusion of a quite substantial piece of litigation. I would not go so far as to say that the Employment Tribunal was bound

> to order a hearing, although it seems to me that it would have been a sensible course to take. But I think the Employment Tribunal was plainly wrong not only to refuse the application for an oral hearing but also to proceed immediately to determine the application for costs, when it was clear that the letter dated 11 October was not intended to set out the whole of the Respondent's case. The absolute minimum required of the Employment Tribunal was that the Respondent should be given an opportunity, if an oral hearing was to be refused, to develop in writing the submissions it wished to make and to produce the costs breakdown on which it wished to rely.
>
> 23. The Respondent's key point in his submissions is that the Employment Tribunal had reached a strong view that it was not inclined to make an order for costs. Why then, he asks, should it order a hearing to no purpose? The Employment Tribunal had, however, reached its view without hearing submissions which the Respondent wished to make and it did not even know how the Respondent would develop its case concerning the manner in which the Claimant had conducted the litigation. The Employment Tribunal was required to keep an open mind until it had given the Respondent a fair opportunity to make those submissions.
>
> 24. Further, I do not think that the Employment Tribunal's reasons for rejecting the application meet the basic minimum standard to be expected of such reasons. The first question for the Employment Tribunal to consider was whether the threshold conditions for an award of costs were met: in other words, whether the Claimant had, as alleged, acted vexatiously, abusively or otherwise unreasonably.

27. As neither part had referred me to this authority, I gave both parties an opportunity to make supplementary submissions in respect of it.

28. The real point in **Onyx** is that despite the reluctance of the EAT to interfere with costs determinations of the employment tribunal it will do so if it considers that the party applying for costs has not had a fair opportunity to advance their application, and the arguments in its favour, in writing or at a hearing, because such unfairness would amount to an error of legal principle. This is consistent with the many authorities on oral and written submission on matters other than cost to which Mr Sethi referred.

29. I have concluded that in the particular circumstances of this case the determination of the employment tribunal did not involve an error of law, because:

29.1. The employment judge was entitled to conclude that the application did not set out proper grounds. While it set out the specific provisions of the costs rules relied upon

it did not properly set out the specific grounds

29.2. It was not incumbent on the employment judge to guess what grounds the respondent wished to advance

29.3. There was no good reason why the specific grounds could not have been set out concisely as they were in the skeleton argument for this hearing - and was the case in **Onyx** in which the "core reasons" had been set out in the written application

29.4. There are a number of reasons why the grounds should be set out concisely in the application:

29.4.1. The 28 day time limit for making an application for costs would be rendered meaningless if the application for costs was merely a starting point and there was no requirement to set out at least succinct grounds which could need only be provided after the time limit has expired

29.4.2. A respondent to an application for costs would not have a fair opportunity to respond if the succinct grounds are not set out

29.4.3. It is particularly important to set out the specific grounds on which an application is made for costs as costs are the exception rather than the rule

29.5. Although the proposed directions demonstrated that the respondent wished to have the application determined at a hearing, unlike in **Onyx**, the respondent did not make it "plain that there was further information and argument which the respondent wished to present"

29.6. On the contrary, the written application expressly stated that "Details of the application and the reasons why it is sought are contained in the application itself". The employment judge was entitled to take the respondents at their word

30. There are a number of other reasons why I am also satisfied that the respondents are extremely unlikely to suffer any disadvantage by reason of this appeal failing:

30.1. The key ground, the identity of HRR as the fifth respondent, upon which the claimant

failed in the employment tribunal has now been overturned by Choudhury J in the EAT

30.2. A similar application for costs to that the respondents would like to have another opportunity to advance before the employment tribunal failed in the EAT

30.3. The respondents had an opportunity to seek to reargue their costs application in the employment tribunal but chose to withdraw the reconsideration application

31. Accordingly, the appeal fails. The overview of the procedural history demonstrates that this case has taken up more than its fair share of limited judicial resources. Hopefully, it has now reached its conclusion.